70 FLRA No. 144

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

0-NG-3387

_____

DECISION AND ORDER ON NEGOTIABILITY ISSUES

July 19, 2018

_____

Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester concurring, in part, and dissenting in part)

Decision by Member Abbott for the Authority

I. Statement of the Case

This matter is before the Authority on a negotiability appeal filed under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (Statute).[1] It concerns the negotiability of two Union proposals related to how the Agency calculates employees' compensation for travel. Proposal 1 proposes using road miles instead of an "as the crow flies" radius to define the area encompassing the official duty station. Proposal 2 proposes that when employees travel outside of the official duty station, their entire travel, not just the segment outside of the official duty station, be considered hours of employment.

We find that Proposal 1 is nonnegotiable because it is contrary to § 300-3.1 of the Federal Travel Regulations (FTR)[2] and that Proposal 2 is nonnegotiable because it is contrary to 5 C.F.R. §§ 550.112(j)(2) and 551.422. Accordingly, we dismiss the Union's petition.

[1] 5 U.S.C. § 7105(a)(2)(E).
[2] 41 C.F.R. § 300-3.1.

II. Background

During term negotiations, the Union submitted Proposals 1 and 2. The parties agreed to sever the two proposals from the new national agreement, which went into effect on October 1, 2017.[3]

The Union filed its negotiability petition on October 31, 2017. A post-petition conference was held with the parties on November 20, 2017. The Agency filed its statement of position on December 14, 2017. The Union filed its response on January 12, 2018, and the Agency filed its reply on February 14, 2018.

III. Proposal 1

A. Wording

> C. 1. For applicable travel compensation purposes, (e.g., mileage, lodging, per diem, overtime), the official duty station extends 50 road miles from the employee's official duty station in every direction. The 50 road mile rule for determining travel compensation should not be applied to local travel procedures and mileage reimbursements contained in Section 5.[4]

B. Meaning

The Union explains that, elsewhere in their agreement, the parties have defined "official duty station" as "the location where the employee normally reports for the workday."[5] At the conference, the parties agreed that the proposal would require the Agency to calculate travel compensation by using "road miles instead of the straight-line (or 'as the crow flies') standard."[6]

The Union explained that employees' hours of employment are relevant for computing their entitlement to various travel compensation available under the Fair Labor Standards Act (FLSA) and the Federal Employee Pay Act (FEPA).[7] The Union explained that its proposal is intended to more accurately measure the distance traveled by bargaining-unit employees because "the straight line may measure a map distance of 40 miles, [but] traveling around [a] mountain or body o[f] water could result in a road trip of 51, 71, [or] 91 []miles."[8]

[3] Resp., Attach. A at 2.
[4] Pet. at 4.
[5] *Id.* at 5 (citing Art. 16, § 2.A.).
[6] Post-Petition Conference (PPC) Record at 2 (quoting Pet. at 5).
[7] Pet. at 5.
[8] *Id.* at 5-6.

The Agency agreed with the Union's explanation of the meaning and operation of the proposal.[9]

C. Analysis and Conclusion: Proposal 1 is contrary to § 300-3.1 of the FTR.

The Agency argues[10] that Proposal 1 is contrary to 5 C.F.R. §§ 550.112(j) and 551.422(d), and § 300-3.1 of the FTR.[11] Specifically, the Agency argues that the cited regulations vest it with "the authority to decide the geographic boundaries of the official duty station"[12] and that Proposal 1 does not include a "definite domain" as § 300-3.1 of the FTR requires.[13]

The Union argues that fifty road miles qualifies as a "definite domain" under the FTR.[14] The Union contends that using road miles as a measurement is reasonable because "employees almost exclusively use roads to travel" and cites court cases finding that the "as the crow flies" measurement is unreasonable.[15] It argues that Proposal 1 "does not in any way affect the requirement that employees travel in a manner that results in the greatest advantage to the [g]overnment and ensures that it is by the most expeditious means practicable."[16]

Title 5, §§ 550.112(j) and 551.422(d) of the Code of Federal Regulations, provide in relevant part that

> [a]n agency may prescribe a mileage radius of not greater than 50 miles to determine whether an employee's travel is within or outside the limits of the employee's official duty station for determining entitlement to overtime pay for travel . . . [but] an agency's definition of an employee's official duty station for determining overtime pay for travel may not be smaller than the definition of "official station and post of duty" under the [FTR] issued by the General Services Administration (41 CFR 300–3.1).[17]

Section 300-3.1 of the FTR defines "official station"[18] as

> [a]n area defined by the agency that includes the location where the employee regularly performs his or her duties . . . . The area may be a mileage radius around a particular point, a geographic boundary, or any other definite domain, provided no part of the area is more than 50 miles from where the employee regularly performs his or her duties . . . . If the employee's work involves recurring travel or varies on a recurring basis, the location where the work activities of the employee's position of record are based is considered the regular place of work.[19]

The parties disagree whether "[fifty] road miles from the employee's official duty station in every direction" constitutes a definite domain.[20]

Our reading of the plain wording of this regulation finds that fifty "road miles" is not a mileage radius around a particular point,[21] a geographic boundary, or an "other definite domain," as required by § 300-3.1.[22] It is not a definite area, and could extend more

[9] PPC Record at 2.

[10] Because we find that the proposal is contrary to § 300-3.1 of the FTR, we do not reach the Agency's arguments that: the proposal interferes with management's right to determine its organization, *see* Statement at 9 (citing *AFGE, Local 1336*, 52 FLRA 794, 802 (1996)); the proposal is contrary to 5 C.F.R. § 1403, *id.* at 5; and the Agency has sole and exclusive discretion over the matter, *id.* at 10; *Laborers Int'l Union of N. Am.*, 70 FLRA 392, 396 (2018) (*LIUNA*) (Member DuBester dissenting).

[11] Statement at 3-11.

[12] *Id.* at 4.

[13] Reply at 5-6.

[14] Resp. at 6, 10.

[15] *Id.* at 5-6 (citing *Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 729 (10th Cir. 2006) (when considering distance for purposes of Family Medical Leave Act eligibility, surface miles was a reasonable measurement and "as the crow flies" was not); *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 739 (5th Cir. 2005) (same); *Veltri v. Abbott Severance Pay Plan for Emps. of Kos Pharms.*, No. 08-00915, 2010 WL 376621, at *5 (D. N.J. Jan. 25, 2010) (in administering severance plan, "uniform methodology" using "as the crow flies" method to measure 50 miles unfair and unreasonable for failing to account for the Long Island Sound)).

[16] *Id.* at 8.

[17] 5 C.F.R. §§ 550.112(j), 551.422(d).

[18] "Post of duty" is defined as "[a]n official station outside [of the Continental United States(]CONUS[)]." 41 C.F.R. § 300-3.1.

[19] 41 C.F.R. § 300-3.1.

[20] Pet. at 4.

[21] The FTR does not define "radius," but the dictionary defines it, in pertinent part, as "a *straight* line from the center to the circumference of a circle or sphere," or "a specified distance from a center in all directions." *Radius, New Oxford American Dictionary* (3d ed. 2010) (emphasis added).

[22] "Definite domain" is not defined within the FTR, but the dictionary defines "definite" as "clearly stated or decided; not vague or doubtful." *Definite, New Oxford American Dictionary* (3d ed. 2010). The word "domain" is defined as "[t]he territory over which sovereignty is exercised." *Domain, Black's Law Dictionary* (10th ed. 2014). *See generally In the Matter of Donald C. Barnes*, CBCA 4089-TRAV, 15-1 BCA ¶ 35985

than fifty miles from where the employee regularly performs his or her duties or vary with every employee and every trip. Therefore, "fifty road miles" is contrary to the prescribed official station area definitions outlined above. Accordingly, we find Proposal 1 to be nonnegotiable.[23]

IV. Proposal 2

A. Wording

> C. 2. Any time spent traveling outside of the official duty station is considered hours of employment for purposes of overtime compensation under COPRA, FLSA, FEPA, or compensatory time for travel. In such circumstances, the entire time spent traveling, and not just the time spent traveling outside of the official duty station, will be considered hours of employment. For example, if the employee travels 50 road miles within the official duty station, and then an additional 2 miles outside of the official duty station, all 52 miles is considered hours of employment.[24]

B. Meaning

In its petition, the Union explains that COPRA stands for the Customs Officer Pay Reform Act, which is used by the Agency to determine overtime compensation.[25] Section III.B. above defines FLSA and FEPA, which are used to calculate overtime compensation when COPRA does not apply.[26] The Union also explains that "compensatory time for travel" refers to an employee's entitlement to compensatory time under Agency policy.[27]

At the conference, the parties agreed that the proposal would require the Agency to calculate travel compensation by the total time spent traveling—including both the time spent traveling within and beyond the employees' official duty station area.[28]

In its response, the Union states that the proposal "presupposes that" employees meet the requirements for COPRA, FLSA, FEPA, or compensatory time for travel in order "for such travel to be considered 'hours of employment.'"[29] The Union explains that the proposal "does not provide a new entitlement, but rather conveys that the time is considered hours of employment for the relevant pay/compensatory time depending on what the employee qualifies for under COPRA, FLSA, FEPA, etc."[30] Further, the Union argues that 5 C.F.R. §§ 550.112(j)(2) and 551.422(b) apply to the proposal, such that an employee's normal commute time may be subtracted.[31] The Agency in its reply argues that the Union's explanation "is not consistent with the plain meaning of the proposal language."[32]

Where the parties disagree over the meaning of a proposal, the Authority looks first to the proposal's wording and the union's statement of intent.[33] If the union's explanation of the proposal's meaning comports with the wording, then the Authority relies on that explanation to assess whether the proposal is within the duty to bargain.[34] But when a union's explanation is inconsistent with the plain wording, the Authority does not adopt that explanation, and instead, bases the negotiability decision on the proposal's wording.[35]

By its literal terms, the proposal concerns "[a]ny time" traveling outside of the official duty station and it requires that the entire time spent traveling, and not just the time spent traveling outside of the official duty station, will be considered hours of employment, when the Agency calculates travel compensation. Nothing in the proposal's language suggests that the proposal is subject to 5 C.F.R. §§ 550.112(j)(2) and 551.422(b) or that employees' normal home-to-work commutes may be subtracted from their hours of employment under the proposal. While the Union argues its proposal is subject to other legal requirements, the plain wording of the proposal does not contain such limitations. Thus, the Union's explanation is inconsistent with the plain

(2015) (eligibility for per diem expenses permitted only when employee performs travel away from official duty station).

[23] *See NFFE, Local 2199, IAMAW, Fed. Dist. 1*, 66 FLRA 412, 413 (2011) (*Local 2199*) (where FTR directly prohibits an expense, proposal is contrary to law). We note that the Union did not request severance of Proposal 1. *See* Resp. at 12.

[24] Pet. at 7.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] PPC Record at 2 (citing Pet. at 7).

[29] Resp. at 13.

[30] *Id.*

[31] *Id.*

[32] Reply at 17.

[33] *Nat'l Nurses United*, 70 FLRA 306, 307 (2017) (*NNU*) (citing *AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 819, 825 (2012)); *NAGE, Local R-109*, 66 FLRA 278, 278 (2011) (*Local R-109*) (citing *NAGE, Local R1-100*, 61 FLRA 480, 480 (2006) (Member Armendariz concurring)); *AFGE, Local 1900*, 51 FLRA 133, 138-39 (1995) (*Local 1900*).

[34] *NNU*, 70 FLRA at 307; *Local R-109*, 66 FLRA at 278; *Local 1900*, 51 FLRA at 138-39.

[35] *Prof'l Airways Sys. Specialists*, 64 FLRA 474, 477 (2010); *AFGE, Local 12*, 60 FLRA 533, 537 (2004) (*Local 12*); *Ass'n of Civilian Tech., N.Y. State Council*, 56 FLRA 444, 446-47 (2000) (*N.Y. State*); *IFPTE, Local 35*, 54 FLRA 1384, 1386-87 (1998) (*Local 35*) (Member Wasserman dissenting); *IFPTE, Local 3*, 51 FLRA 451, 459 (1995) (*Local 3*) (citing *NFFE, Local 251, Forest Serv. Council*, 49 FLRA 1070, 1081 (1994)); *see also LIUNA*, 70 FLRA at 393-94.

wording of the proposal. Accordingly, in assessing the negotiability of Proposal 2, we rely on that proposal's plain wording.[36]

C. Analysis and Conclusion: Proposal 2 is contrary to 5 C.F.R. §§ 550.112(j)(2) and 551.422.

The Agency argues that Proposal 2 is contrary to law because employees are not entitled to compensation for their ordinary commutes and "the Union's proposal is written in such a way that an employee would be compensated for traveling within his official duty station from home to an alternate duty station, as there is nothing in th[is] proposal that subtracts this time and therefore makes it non-compensable time."[37] The Agency argues that it is specifically contrary to 5 C.F.R. §§ 550.112(j)(2) and 551.422, 29 C.F.R. § 785.35, and Authority case law stating that commuting time is generally not compensable.[38]

The Union argues that Proposal 2 is not contrary to law because "nothing" in the proposal "is intended to violate any law with respect to reimbursement and accountability for hours of work."[39] Further, the Union argues, the proposal does not prevent the Agency from disciplining an employee who wrongfully drives during duty hours.[40]

The regulations cited by the Agency state, in relevant part, that home to work travel is not considered hours of work and "[w]hen an employee travels directly from home to a temporary duty location outside the limits of his or her official duty station, the time the employee would have spent in normal home to work travel *shall* be deducted from hours of work."[41]

The plain wording of Proposal 2 requires that the entire time the employee spends traveling be considered hours of employment. The Union's example provides that "if the employee travels [fifty] road miles within the official duty station, and then an additional [two] miles outside of the official duty station, all [fifty-two] miles is considered hours of employment."[42] Under the proposal, an employee could leave home and travel to a temporary duty station located outside of the official duty station area, and the entire travel time, including the ordinary commuting time, would be considered hours of work. This is incompatible with the express wording of 5 C.F.R. §§ 550.112(j)(2) and 551.422(b).[43] Moreover, it is inconsistent with Authority case law outlining that proposals that would compensate employees for commuting are nonnegotiable.[44] Accordingly, we find Proposal 2 to be nonnegotiable.[45]

V. Order

We dismiss the Union's petition.

[36] *Local 12*, 60 FLRA at 537; *N.Y. State*, 56 FLRA at 446-47; *Local 35*, 54 FLRA at 1387; *Local 3*, 51 FLRA at 459.
[37] Statement at 15.
[38] *Id.* at 12-19 (citing *NTEU*, 59 FLRA 119, 122 (2003) (*NTEU*) (Member Pope dissenting), *aff'd sub nom. NTEU v. FLRA*, 418 F.3d 1068 (9th Cir. 2005) (*NTEU II*); *NFFE, Local 1445*, 16 FLRA 1094 (1984)).
[39] Resp. at 15.
[40] *Id.* at 13.
[41] 5 C.F.R. §§ 550.112(j)(2), 551.422 (emphasis added); *see also* 29 C.F.R. § 785.35.
[42] Pet. at 7.
[43] 5 C.F.R. §§ 550.112(j)(2) ("Travel from home to work and vice versa is not hours of work. When an employee travels directly from home to a temporary duty location outside the limits of his or her official duty station, the time the employee would have spent in normal home to work travel shall be deducted from hours of work."); 5 C.F.R. § 551.422(b) ("An employee who travels from home before the regular workday begins and returns home at the end of the workday is engaged in normal "home to work" travel; such travel is not hours of work. When an employee travels directly from home to a temporary duty location outside the limits of his or her official duty station, the time the employee would have spent in normal home to work travel shall be deducted from hours of work as specified in paragraphs (a)(2) and (a)(3) of this section.").
[44] *NTEU II*, 418 F.3d at 1071-72; *Local 2199*, 66 FLRA at 413; *AFGE, Local 1226*, 62 FLRA 459, 462, 464-65 (2008); *NTEU*, 59 FLRA at 122-23; *NAGE*, 37 FLRA 263, 269-75 (1990).
[45] We note that the Union did not request severance of Proposal 2. Resp. at 16.

Member DuBester, concurring, in part and dissenting, in part:

I agree that Proposal 2 is nonnegotiable. However, I disagree with the majority's conclusion that Proposal 1 is contrary to § 300-3.1 of the Federal Travel Regulations (FTR). Because Proposal 1 is consistent with the FTR, I would find the proposal negotiable.

Proposal 1 defines affected Agency "official duty stations" in terms of road miles, rather than straight-line or "crow-fly" miles. Considering the FTR's language and purpose, I would find that Proposal 1 is not inconsistent with the FTR.

FTR § 300-3.1 defines "official station" in relevant part as "a mileage radius around a particular point, a geographic boundary, or any other definite domain."[1] The geographic-boundary part of the definition is irrelevant in this case. And the mileage-radius part of the definition is the part to which Proposal 1 provides an alternative. So the pertinent question is whether Proposal 1 is consistent with the part of § 300-3.1 that allows an "official station" to be defined in terms of a "definite domain." I note that although there is apparently no judicial interpretation of the term "definite domain," it seems clear Congress intended that "definite domain" be an alternative to the FTR's straight-line "mileage radius" way of defining an "official station."

Proposal 1 allows the Agency to define its official duty stations in terms of "definite domains." Under Proposal 1, the Agency has discretion to specify a definite area for a particular official duty station by specifying that road-mile travel to particular destinations be "by the most expeditious means practicable."[2] By allowing the Agency to determine the exact route for specific trips, the proposal permits the Agency to create a uniformity for road-mile travel that results in an official-duty-station whose "domain" is as "definite" as an official duty station defined in terms of a straight-line "mileage radius around a particular point." [3]

Proposal 1 is also consistent with the FTR's purposes. A basic purpose of the FTR is to fairly compensate employees for official travel.[4] A companion purpose is to minimize government expense. [5] Because employee compensation and benefits under Proposal 1 are directly related to employees' actual travel, Proposal 1 is certainly "fair." And because Proposal 1 allows the Agency to require that travel be "by the most expeditious" route, [6] it also accords with the FTR's purpose to minimize government expense.

For these reasons, contrary to the majority, I would find Proposal 1 consistent with the FTR, and negotiable.

[1] 41 C.F.R. § 300-3.1.
[2] Resp. at 8.
[3] 41 C.F.R. § 300-3.1.
[4] *See generally* 41 C.F.R. § 300–1.1.
[5] *See* 41 C.F.R. §§ 300-1.2, 301-70.100, 301-10.8.
[6] Resp. at 8.